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In the Supreme Court of the United States

OCTOBER TERM 1968

THE SUMMIT FIDELITY & SURETY COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MELVIN B. LEWIS
30 North LaSalle Street
Chicago, Illinois 60602
Telephone 312/346-0570
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILL. 6618 LA Review 5-6581

INDEX

	PAGE
Opinion below	2
Jurisdictional statement	2
Questions presented for review	2
Statute involved	3
Statement of the Case	4
State Court Proceedings	15
Basis of Federal Jurisdiction	15
Reasons relied on for allowance of writ	16
Conclusion	34
Appendices:	
Appendix A—Opinion of the Court of Appeals	App. 1
Appendix B—Denial of Petition for Rehearing	App. 4
Appendix C—Order of U. S. Court of Appeals, Sixth Circuit, in U. S. vs. Singleton	App. 5

LIST OF AUTHORITIES CITED

Cases

Dudley v. United States, 242 F.2d 656	21, 23, 32
Herzog v. United States (Chamber opinion), 99 L.Ed 1299	17
Leigh v. United States (Chamber opinion), 8 L.Ed2d 269	17
Stack v. Boyle, 342 U.S. 1	17
United States v. D'Argento, 339 F.2d 925	20, 25

PAGE

United States v. Davis, 202 F.2d 621 ..... 21, 32

United States v. Singleton, No. 17038, 6th Cir. 1967 (reprinted as Appendix C) 32

Statutes

Rules 46 (f) and 46 (g), F. R. Crim. Proc. 13, 23

Relevant portion reprinted 3

Text

Bail in the United States: 1964. A report to the National Conference on Bail and Criminal Justice, Washington, D.C. (Prepared by Daniel J. Freed and Patricia N. Wald under the co-sponsorship of United States Department of Justice and The Vera Foundation, Inc.) 18, 19

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To The Honorable, the Chief Justice and the Associated Justices of the Supreme Court of the United States:

Your petitioner, The Summit Fidelity & Surety Company, respectfully prays that a Writ of Certiorari issue from this Court to review the decision of the United States Court of Appeals for the Seventh Circuit rendered on March 1, 1968.

A. OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. That opinion is herein set forth as Appendix "A".

No opinion was rendered in the District Court.

B. JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals here sought to be reviewed, was rendered on March 1, 1968. A petition for rehearing was timely filed, and was denied on March 21, 1968. Jurisdiction to review that judgment by Writ of Certiorari is conferred upon this Court by Title 28 U.S.C. Sec. 1254(1).

C. QUESTIONS PRESENTED FOR REVIEW

1. Can a judgment be rendered against a bail surety as redress for an act of disrespect on the part of the bail principal, not involving a failure to appeal promptly for trial, nor any inconvenience to the Government, nor any delay or impairment of the processes of justice?

2. What is the nature of the risk assumed by a bail surety?

3. Is the guilt of the defendant, or his willingness to plead guilty, a proper consideration in determining whether to forfeit bail?

4. Where the Government is holding monies deposited by a bail principal, and a forfeiture of bail is declared, can the Government, over the objection of the surety, refund the deposit made by the principals while attempting to collect the forfeiture from their surety?

5. Does Rule 46 (g) of the Federal Rules of Criminal Procedure, prohibit the enforcement of a forfeiture against a bail surety who has made a timely surrender of the defendant into custody?

6. With respect to appellate review of the denial of a bail surety's motion for remission under Federal Rule 46 (f) (4) of Criminal Procedure, which of the following is correct:

a. The holding of the Seventh Circuit that such orders are completely discretionary with the District Court, and not ordinarily subject to review? or,

b. The rule in the Fifth Circuit that such orders are reviewable to the same degree as any other final order? or,

c. The procedure in the Sixth Circuit, wherein the Court of Appeals will determine the amount to be remitted?

D. STATUTES INVOLVED

Rule 46 of the Federal Rules of Criminal Procedure provides, in relevant part:

(f) **Forfeiture.**

(1) **Declaration.** If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) **Setting Aside.** The court may direct that a forfeiture be set aside upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) **Enforcement.** When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. • • •

(4) **Remission.** After entry of such judgment, the court may remit it in whole or in part under the conditions to the setting aside of forfeiture in paragraph (2) of this subdivision.

(g) **Exoneration.** When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

E. STATEMENT OF THE CASE

Petitioner acted as bail surety for federal criminal defendants Kelley and Nichols. On the day set for trial, the District Court was still engaged in the trial of a different case. The prosecutor announced that the defendants, who were facing similar charges in two other districts, were in Milwaukee arranging for a disposition of all charges under Rule 20. The district judge directed the prosecutor to return at 2:00 P.M. to report the outcome of the Wisconsin proceedings. At 2:00 P.M. the prosecutor advised the court that only one of the two defendants had pleaded guilty in Wisconsin; that the other had changed her mind "at the last minute, apparently", so that the case would still have to be tried. The trial judge thereupon forfeited the bail of both defendants and continued the trial to the following Monday although expressing some uncertainty as to whether the case on trial would be completed by them.

On the following Monday, the defendants appeared with their counsel. The surety had advised them of the necessity of their presence, and had brought them to the courtroom. The record shows no custodial effort by the Government, and the bench warrant had not even been issued at that time.

The trial judge denied the surety's motion to vacate the bail forfeiture. The defendants subsequently changed their pleas to guilty. There were thereupon permitted to return to Milwaukee to dispose of all charges under Rule 20, and were enlarged upon their personal recognizances in the same case in which their bail had been forfeited.

Thereafter, judgment was entered against the surety on the forfeitures, and its motion to remit the judgment was denied. Over the surety's objection, the sum of $4,000 deposited by the defendants with the Clerk of the District Court in Milwaukee, was refunded to them. The surety argued unsuccessfully that the deposits should be applied to the forfeiture rather than refunded to the defendants.

Surety appealed from the bail forfeiture judgments and from the order denying remission. On appeal, those orders were affirmed by the Court of Appeals for the Seventh Circuit.

Surety here presents its petition for certiorari, seeking review of that judgment.

* * *

With that prefatory overview, we present a statement of the facts in sufficient detail to enable this court to apprehend the background of the issues here presented.

Charges were brought against defendants Kelley and Nichols in three federal districts: Wisconsin, Nevada and Illinois. All charges related to thefts from federally insured banks. The Wisconsin and Nevada indictments were returned in May of 1966; the Illinois proceedings, which gave rise to this appeal, commenced with an indictment filed the following August (A. 8, 9).

In May of 1966, the Wisconsin court set bail for each of the defendants at $25,000 personal recognizance on the Nevada indictment, and $20,000 personal recognizance with $2,000 cash deposit on the Wisconsin indictment (A. 8).

Bail bonds were filed accordingly. Defendant Nichols posted $2,000 in cash through her mother, who did not sign the bail bond as surety (A. 7). Nichols also posted an additional $2,000 as surety for the defendant Kelley, and signed his bail bond in that capacity (A. 7).

The return of the Illinois indictment was preceded by commissioner's proceedings during July of 1966 against the defendant Kelley. Before the commissioner, Kelley filed two bonds: a $15,000 personal recognizance bond, and a $5,000 surety bond with the Summit Fidelity & Surety Company, petitioner herein, as surety. On the return of the indictment in August, the defendant Nichols filed her surety bond, with petitioner as surety, in the amount of $5,000.

The record does not reflect any reason why Kelley was required to file two bonds before the commissioner. There is likewise no order directing that either of the bonds thus filed by him before the commissioner, stand as bail on the indictment subsequently returned.

The defendants pleaded not guilty. They were represented by one Max Goldsmith of Milwaukee, with a Mr. Nathanson as local counsel (A. 10).

The court fixed time for filing of motions, and set the matter for October 10, 1966 for ruling on motions and for setting of a trial date (Docket entry, 8-29-66).

On October 10, 1966, with counsel present but in the absence of the defendants (A. 16-17), motions were settled and a trial date of November 10, 1966 was set.

A few days in advance of November 10, agents of petitioner advised the defendants of the necessity of their appearance (A. 3, 20).

On the morning of November 10, the court was engaged in another trial, which had been in progress for several days. (A. 4, 12) When the case was called, the government answered ready. However, the prosecutor explained that he had received a call from Mr. Goldsmith, stating that the defendants proposed to appear in the district court in Milwaukee and plead guilty under Rule 20. Thereupon, the following colloquy ensued:

> The Court: Their clients are due to appear in the United States District Court.
>
> Mr. Brunner (prosecutor): He said he was going in this morning, your Honor.
>
> The Court: What do you suggest be done with this case now?
>
> Mr. Brunner: Two o'clock?
>
> The Court: We will go until two o'clock.
>
> Mr. Brunner: That would be fine.

At two o'clock on November 10, the case was again called. The prosecutor explained that he had learned from the United States Attorney's office in Milwaukee that the case had not been set in Milwaukee that morning, but both defendants had appeared there with counsel and advised the United States Attorney of their desire to plead guilty under Rule 20 to all three indictments. "However, the one defendant, Nichols, at the last minute apparently . . . decides she would not change her plea, but that Kelley, the other defendant, still wished to change his." The prosecutor further stated that ". . . at two o'clock they were to appear before Judge Reynolds to change Kelley's plea from not guilty to guilty and then proceed with the paper work so we could have the case transferred", but that the Illinois District Court would still be left with the case of the defendant Nichols (A. 11).

The court noted that local counsel for the defendant Nichols was not present and asked what the bail was. The prosecutor replied that it was $5,000 with surety (A. 12). Thereupon, the following ensued:

> The Court: There is no showing here, no lawyer for the defendant. Let an order be entered forfeiting the bail of both defendants. Let a warrant issue for their apprehension. Put the case down for Monday morning on the trial call.[1]
>
> Mr. Brunner: Could I ask you one other question? I understand you are on trial at the moment. Could you give the government any estimate of when you might reach us?
>
> The Court: I find that is dangerous, Mr. Brunner. I really don't know. I haven't been told. The plaintiff is about to rest. I don't know what the defendant is going to do. We will have some orations, perhaps, unless I respect any motion charging the jury. That is as much as I can tell you.
>
> Mr. Brunner: Thank you, your Honor.

At 3:30 p.m. on November 10, petitioner's agent telephoned the clerk of the court and learned of the order entered that day. He thereupon attempted to reach the defendants, and had a telephone conversation with them on Sunday, November 13, at which time the defendants agreed to meet those agents the following morning. They did so, and were brought to the courtroom with their attorney by petitioner's agents to answer on the call of the case. When the case was called the defendants' who were waiting with petitioner's agents in the courtroom, and who had

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[1] These proceedings were had on Thursday, November 10. The following Monday was November 14.

not then been taken into custody,[2] came to the bar of the court (A. 3).

The court announced the case then on trial had not been concluded, but stated that if the parties "report back here at two o'clock, we may be ready." Mr. Goldsmith asked to "be heard just for the purpose of extending an apology . . . " The court asked what he had done to require an apology. Reminded of the failure to have appeared on the preceding Thursday, the Court expressed its displeasure, and inquired: "Didn't we forfeit the bail here?" (A. 13, 14).

Mr. Goldsmith asked to be heard on behalf of the defendants, and stated that the defendants had not known that they were required to be present before Judge Hoffman the preceding Thursday; that he, Goldsmith, had wanted them in Milwaukee; that it was his purpose to plead in Milwaukee under Rule 20 and thus dispose of all matters including those originating in Nevada and Illinois. He explained that he had been on trial and unable to bring the defendants to Milwaukee prior to the preceding Thursday, and in fact had to obtain a recess in order to do it then, ". . . but the fatal mistake I made was believing once we accomplished that in Milwaukee and the consent obtained by the government here, a trial here would be moot, and that was the poor judgment that I exercised."

The Court replied that any setting on its calendar "requires the attendance of the defendant or defendants, and it certainly requires the appearance of local counsel. There is no excuse for that." He ordered that the case be held

[2] The bench warrants were not actually issued until November 14. (Docket entry, 11/14/66).

until two o'clock pending completion of the other case on trial (A. 15).

Mr. Goldsmith stated that the defendants were being made to suffer because of his acts. The Court observed: "Then they had better get lawyers who will attend to their affairs." (A. 16-17).

Mr. Goldsmith stated that one defendant had already entered his plea and consent in Wisconsin, but the court stated that it was "not concerned, sir, about what goes on in other jurisdictions . . . It is on my trial call. It is the next case on." Mr. Goldsmith asked "that the order of the court vacating bond be restored." The court refused, stating: "You also told me, sir, you are talking about Rule 20 pleas in other jurisdictions . . . That means that I am dealing with people who think they are guilty, because that is the only kind of plea that can be accepted under Rule 20. The motion of the defendants to vacate the order terminating the bond will be denied." Mr. Goldsmith asked that the forfeiture be vacated, and the court denied that as well. (A. 16-18).

At two o'clock, counsel for the petitioner appeared and moved to vacate the bail forfeiture.

Counsel stated that the surety had been blameless, and that he was prepared to present evidence on the issue (A. 19). He first offered to prove that representatives of the surety had notified the defendants a few days in advance of November 10 of their required court appearance. The court observed that a contrary representation had been made to it earlier by defense counsel. Petitioner's counsel replied he could not "account for the representations that your Honor received from other sources, but I will say to the court —" The court interrupted to say that based on the record surety's motion would be denied.

Petitioner's counsel twice attempted to make a further presentation but the court refused to hear anything further from the surety. (A. 20).

A jury was then called for. Defense counsel requested "a couple of days continuance for the purpose of completing procedures to plead the defendant Nichols guilty under Rule 20 in Wisconsin." He stated that the defendant Kelley had already pleaded guilty to the Wisconsin charge and had completed papers consenting to the transfer of the case at bar in Illinois, to Wisconsin. Those consents also "were apparently received and consented to by the United States Attorney for the Eastern District of Wisconsin, and they were sent to . . . the United States Attorney for the Northern District of Illinois." He represented that the defendant Nichols wished to do the same thing and asked to be returned to Wisconsin for that purpose.

The court stated it had no authority to return her to Wisconsin, but stated that if she wanted to plead guilty before him, she might do so. Her attorney answered that Nichols had "no desire to plead guilty in this court, your Honor." The court denied the request. (A. 21-23).

The trial thereupon proceeded. At the opening of court on the third day of trial, the trial judge asked whether the prosecutor had "your papers drawn for the consent." The prosecutor replied that he did, but that they lacked approval. The defense thereupon moved for a mistrial on the grounds that one of the defendants had perfected the papers required for a transfer under Rule 20, and that the other "had designated her interest so also to do." Defense counsel explained that the defendants desire to have all their matters disposed of in one court rather than stand trial separately in each court. The defense counsel also requested that the defendants be returned to the Eastern District of Wisconsin. (A. 23-24).

Without statement of grounds, the government objected to the motion.

The trial judge advised the defendants of the effect of their motion, and explained that it would involve a plea of guilty and would cause them to be transported to Milwaukee. Both defendants agreed.

The court thereupon allowed the motion for mistrial. The transfer consent on defendant Kelley had already been approved by the United States Attorney for the District of Wisconsin, and was thereupon signed in open court by the Chicago prosecutor. Defense counsel stated that the oral consent of the Milwaukee prosecutor had also been obtained for the transfer of the defendant Nichols (A. 23-25).

The court ordered that the marshal transport the defendants to the Eastern District of Wisconsin, and adjourned the matter to the following Friday. The court advised defense counsel that he need not reappear at that time if the matters had been disposed of in Wisconsin; but if not, "I would want you here to explain why they haven't been because you have a pending case here." The trial judge expressed his appreciation of defense counsel's "careful representation of your clients as well as your courtesy to the court." (A. 25-26).

On the following Friday, the prosecutor appeared and advised the court that the transfer procedure had been accomplished and pleas of guilty entered, so that there was nothing remaining to be done in that court. The court thanked the prosecutor for his cooperation, and observed: "I think that was a constructive deposition. I have in mind the large amount of time that would be necessary to try these cases in all three jurisdictions." (A. 26).

On December 8, petitioner filed a written motion to vacate the forfeiture orders. That motion was denied summarily on its presentation (A. 3, 4).

On December 15, 1966, after their pleas of guilty, each of the defendants was released on his own recognizance in this case by the District Court in Milwaukee, with permission to travel to Cook and Lake Counties in Illinois.[3]

A month after the defendants had been enlarged on their own recognizance in Milwaukee, the government moved for the entry of a judgment against the defendants and this petitioner in Chicago. That motion was allowed[4] (A. 4).

Petitioner thereupon moved for relief from those judgments. In support of its request, it took the following positions (A. 6):

A. That the judgments should be vacated as improperly entered, because all of the conditions of the bond had been met prior to the entry of judgment.

B. In the alternative, Petitioner asked that the judgments be remitted pursuant to statute (Rule 46 (f) (4) F.R. Crim. Proc.) on the same grounds and on the further grounds that the enlarging the defendants on their own recognizance, while enforcing the maximum possible penalty against the petitioner, is not consistent with the requirements of justice.

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[3] The Milwaukee court took note of the $2,000 cash bail which had been posted on the Milwaukee indictment during May of 1966 for each defendant. However, in December, the defendants were only required to sign their names in order to go free.

[4] Notice of the motion was not received by surety until the day the judgment was entered (A. 5).

C. Petitioner urged that in any event the government should be required to first move against the $2,000 posted by each defendant in Milwaukee. It was pointed out that those funds, being in the hands of the Clerk of the U. S. District in his official capacity, could not be reached by process issued on behalf of the petitioner, but were readily available to the government, which could hold up their disbursement by a mere letter or telephone call.

The government answered, stating that the forfeiture had been proper because "the government was prejudiced in that an order of this court was not obeyed. A bench warrant had to be issued and was subsequently served. The FBI expended time attempting to arrest the principals. Justice, then, requires that the motion . . . for remission be denied." The government's pleading made no reference to the petitioner's request that the government be required to proceed against the $2,000 deposited by each defendant in Milwaukee. (A. 7).

During the pendency of the motion, sentences were imposed upon the defendants and service of the sentences commenced (A. 9).

On April 10, 1967, petitioner's motion was denied without opinion or statement of grounds (A. 8).

On April 11, 1967, the Milwaukee court ordered the return of the $2,000 bail by each defendant in that court, and payments were made accordingly (A. 9).

Petitioner thereupon appealed to the United States Court of Appeals for the Seventh Circuit, from the bail forfeiture judgments and from the order denying remission. That Court affirmed, and this petition for certiorari seeks review of that affirmance.

F. STATE COURT PROCEEDINGS

No state court proceedings are involved. The action initiated in the United States District Court.

G. BASIS OF FEDERAL JURISDICTION

Defendants Kelley and Nichols were charged with a federal crime in the United States District Court. Petitioner, as their bail surety, signed bail bonds which were filed in the District Court to assure the defendants' appearance there. The District Court forfeited the bonds and entered judgment against the surety.

The jurisdiction of the United States District Court over petitioner as bail surety; its jurisdiction over the subject matter of the offenses charged within the indictment returned against the defendants; and its jurisdiction over the persons of the defendants and its right to admit them to bail, have never been put in issue at any stage of the proceedings.

H. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The only stated effect of the decision below, is to require a surety company to pay Ten Thousand Dollars for a bail forfeiture. If nothing more were involved, we could not in conscience claim the attention of this Court, no matter how strongly we might feel that the decision is in error.

But the ultimate effect of the decision here sought to be reviewed, must inevitably be the serious impairment of the right to bail for the largest class of bail applicants—those whose resources will not provide complete indemnity to the surety. The decision will very probably compel outright denial of bail to most such persons within the Seventh Circuit, and substantial weakening of their right in all other circuits.

We do not believe that we have overstated the issue in any degree. The error, if any, lies in the opposite direction: in stating as probability, that which is near certainty; in characterizing as impairment, that whose true description is point-blank effective revocation of a cherished right.

And so we feel free to present this Petition. We believe that we have an honest claim to the ear of this Court. We think that we are properly responding to your Honors' expressed willingness to entertain "an important question of federal law which . . . should be settled by this court." We submit that this case calls, as few others do, "for an exercise of this court's power of supervision." (Rule 19—1. b)

We pray that your Honors may agree, and that this Court will deem the case worthy of review and comment.

In that prayer, we believe, we are joined by all thoughtful persons concerned with the problem of pre-trial detention. We are also confident that our prayer is supported by the vast, inarticulate group of unfortunate citizens whose shoulders, in years to come, will feel the hand of the arresting policeman. To tell such persons that they are presumed innocent is to offer cold comfort, if they have no practical vehicle for admission to bail.

* * *

No aspect of the administration of criminal justice is of wider impact than is the issue of bail. Almost all accused persons, in both state and federal proceedings, are faced with the problem of bail at the very threshhold of the case.

Bail is a right of explicit constitutional dimensions. It is the right which very frequently determines the viability of all other rights. The right to counsel of one's choice; the right to compel the attendance of witnesses; the even more basic right to protect one's job and support one's family—all these are frequently evanescent if bail is denied.

Bail, in fact, is the means by which practical fulfillment is given to the presumption of innocence. It "is basic to our system of law." *Leigh* v. *U.S.*, (1962) 8 L.ed. 2d 269, 271; *Herzozg* v. *U.S.* (1955) 99 L.Ed. 1299, 1301 (Opinions in Chambers). As stated by former Chief Justice Vinson: "Unless this right to bail before trial is preserved, the presumption of innocence, secured after only centuries of struggle, would lose its meaning." *Stack* v. *Boyle* (1951) 342 U.S. 1, 4.

Only with profound modification, if at all, could the bail system in its present form survive the application of the precedent established by the opinion below.

The most definitive study of the practicality of bail procedures known to petitioner's counsel, is the Report to the National Conference on Bail and Criminal Justice held at Washington, D.C. during May of 1964. As the report correctly notes, the bulk of those accused who are enlarged on bail achieve their freedom through the professional bondsman who signs bail contracts as agent for a surety company. *Bail in the United States*: 1964, pp. 21-38.

The accused who desires a prompt enjoyment of his right to bail, has only two alternatives.

The first choice is limited to the few and fortunate: those who can deposit with the detaining agency a sum in cash deemed sufficient to guarantee their appearance. Apparently, such persons are a distinct minority of those arrested.[5]

The only other practical alternative "for the vast numbers of defendants unable to raise the bail amount themselves", is the professional bondsman who writes as agent for the surety company. *Bail in the United States*: 1964, p. 22. As the cited report notes, from that source a worthy bail applicant can frequently obtain his release on credit extended by the bondsman-surety. (p. 24)

But there is a corresponding disadvantage, also recognized by the Report, which frequently serves to impair

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[5] Within this class may be included those persons released on individual recognizance. Such releases, although frequently of salutory effect, are relatively rare, and are generally granted only after it has become clear, through a protracted period of detention, that the defendant will be unable otherwise to obtain his release. The Report above cited, indicates that in 1964, 17.4% of federal criminal defendants were ultimately released on personal recognizances (p. 68).

or deny the applicant's entitlement to bail. That obstacle, is the requirement of collateral—property, a co-signer, or both—as a condition to the signing of the bail bond. *Bail in the United States*: 1964, pp. 26-28.

The Report further recognizes the relationship "between collateral demands and enforcement policies on bond forfeitures" (p. 28). It is a serious, but possibly justified criticism which the Report makes: that a worthy bail risk can be denied bail because he is unable to provide indemnity against a forfeiture which is most unlikely to occur.

We here present to your Honors, the other side of the coin.

It is quite obvious that the casual, unnecessary forfeiture of bail must inevitably have the effect of impairing the very right to bail.

Of course, those bail applicants who can provide complete indemnity against forfeiture, will be able to obtain bail bonds with professional surety regardless what the forfeiture policy might be. And of course, in the case of the wilful absconder, bail must be forfeited. Justice will suffer no other course. If the purpose of bail is to be fulfilled, justice demands forfeiture in cases of wilful default, just as strongly as it abhors the casual and unnecessary forfeiture.

But what of that vast group of presumptively innocent applicants whose only credential is an obvious willingness to face the charges against them? Are such persons to be denied bail because of some vague fear of arbitrary forfeiture? If so, the potential for broadcast injustice is clear.

Just such persons, were the defendants Kelley and Nichols. A standard of acceptability of bail risks which would not encompass such persons, could only be the prod-

uct of a resolve to bail only those persons who could themselves pay any forfeiture that might result.

In the case of Kelley and Nichols, as in any case, the surety made an evaluation of the defendants to determine the probability of their wilfully absconding. It concluded—rightly, judged in retrospect—that they would not be guilty of wilful breach of their bail agreement.

Kelley and Nichols were worthy bail risks—so much so, that *after* their bail had been forfeited, and after they had pleaded guilty, they were enlarged on their own recognizance and granted permission to travel interstate. As anticipated, they duly and promptly surrendered to receive and serve their sentences.

A system which would deny bail to such persons, is one which would be obviously ineffective as implementation to the right to bail.

And yet, bail can no longer be written with safety for such persons.

The opinion below makes that fact clear.

When the bail bonds for Kelley and Nichols were written, the petitioner believed that it knew the nature of the risk which it thereby undertook. The Court of Appeals for the Seventh Circuit, like other courts, had made it clear that bail was to be forfeited only if no alternative could be consonant with the requirements of justice. And as though recognizing the difficulty in defining "justice," that court laid down three criteria whose concurrence, it held, must be shown in order to justify a bail forfeiture. These elements were: First, the defendant must fail to appear as required; second, the failure must be without "justifiable excuse"; and third, the government must be prejudiced by some manner by the defendant's act. *U.S.* v. *D'Argento*, 7 Cir. 1965, 339 F.2d 925, 928.

Clear expression was thereby given to the basic nature of a bail undertaking. For until the decision below, bail undertakings and their forfeitures were deemed to have only one objective: "To secure the presence and attendance of a defendant to answer the charges against him, and to respond to the judgment of the court". *Dudley* v. *U.S.*, 5 Cir. 1957, 242 F.2d 656, 658. Thus, the basic risk of the surety, as delineated by the Court of Appeals for the Seventh Circuit, was "the chance that his faith is misplaced in the person who executes the bond as principal." *U.S.* v. *Davis*, 7 Cir. 1953, 202 F.2d 621, 625.

And so—until the rendition of the decision below—in the writing of bail bonds for Kelley and Nichols and numerous others, by this petitioner and by all other surety companies, an evaluation was made of the probability of the *concurrence* of all of these three elements:

1. A failure to appear as required.

3. Resulting prejudice to the prosecution.

2. Absence of any reasonable excuse.

And then came the decision here sought to be reviewed.

We have found no case in which enforcement of a bail forfeiture has been granted in the face of any *one* of the following circumstances, all of which appear in the case at bar:

1. The criminal trial was not delayed by so much as a microsecond. The defendants failed to appear only at a session at which the trial court was unable to proceed in any event because of its involvement in another trial. The trial was not reset, nor was the court's calendar impeded in any way by reason of the failure to appear. Instead, both the court and the prosecutor acted on the premise

that the defendants would in fact appear when they were needed—and this premise turned out to be correct. The defendants appeared voluntarily on notification from the surety, in ample time for their trial.

2. The defendants made no slightest attempt to evade justice. They were in fact, engaged in a legitimate appearance before a different federal court at the very time at which the forfeiture was adjudged; and they had disclosed their whereabouts to the prosecutor, who in turn made them known to the court.

3. The absence of the defendants was occasioned by the good faith advice of their attorney who had requested them to be present in the other court.

4. The defendants' absence was in furtherance of an attempt to pursue the same course of action ultimately ordered by the trial court which adjudged the forfeiture. In fact, the trial court termed the defendants' plan, a "constructive disposition."

5. After the forfeiture was adjudged against the surety, the defendants were released *on their own recognizances.*

6. The cash bond of the defendants was refunded to them by the government, over the protests of the surety, at the same time the government sought to cause the surety to pay, without hope of recourse, a bond forfeiture for those same defendants.

Any one of those circumstances would ordinarily be deemed amply sufficient to prevent enforcement of a forfeiture.

The case at bar does not present merely one of those circumstances. It presents the concurrence of each and all of them.

And it presents something more: the absence of any slightest prejudice to the government. The government was not required to spend one penny, or to exert one iota of energy to cause the defendants to be present for the commencement of their trial. The defendants were taken into custody in the courtroom, whence they had come voluntarily at the request and in the company of their surety, never having had the slightest intention to violate their bail agreements.

And yet, forfeiture was adjudged, and remission denied, in the face of each and all of these circumstances.

There is no logical basis on which this forfeiture can be upheld, without establishing a precedent which will render bail an unreasonably risky undertaking. No legal distinction can be made between the case at bar, and the hypothetical case of a defendant whose case is set for ten o'clock; who appears at 10:05 because his lawyer has asked him to obtain some documents needed for trial; and whose case is not in fact called until 10:15. Such a case would be of the same order of "default" as this one—a purely technical default which does not delay the trial, or affect the call of the court's calendar, or inconvenience anyone, or make the slightest difference to any interested party.

More: the bail surety's principal obligation to the court, has always been the timely production of the principal. The object of bail "is not to enrich the treasury", *Dudley* v. *U.S.*, 5 Cir. 1957, 242 F.2d 656, 659, but to assure the presence of the defendant at the trial. Rule 46 (g), Federal Rules of Criminal Procedure, appears to *command* exoneration of the surety where there has been "a timely surrender of the defendant into custody." Here, the surety produced the defendants in open court well in advance of the time set for their trial. Every purpose of the bail bond was completely fulfilled.

But the opinion below holds that none of this is important, because:

A. The defendants' failure to appear at the unnecessary hearing, was "a conscious . . . flagrant affront to the [the] dignity (of the district court)."

B. The absence of inconvenience to the court and prosecution ". . . was purely a happenstance [which] does not . . . benefit (the defendants)."

C. "The record does not show that [defendants] were aware (that the case could not proceed that day)."

D. "There was the inconvenience [of] the issuance of bench warrants and the enlistment of the aid of the F.B.I."

None of these reasons for forfeiture will withstand examination. None of them can be supported by the record. Taken together, they express a resolve to vest in the District Court unbridled discretion to forfeit bail at the slightest provocation. Any one of them, viewed by a knowledgeable surety or prosecutor, will suffice to turn a bail contract into an undertaking too hazardous to be either useful or available to the average defendant.

The import of the decision, warrants a brief treatment of each of its stated grounds.

A.

The affront to the dignity of the District Court.

Petitioner will be required to pay the bail forfeiture, not because of any meaningful breach of the bail contract, but because the defendants supposedly exhibited insufficient respect to the District Court.

But petitioner, as surety, did not guarantee that the defendants would not affront the dignity of the Court. It guaranteed only, that there would be no meaningful breach of the bail contract. It guaranteed that the defendants would not (1) fail to appear (2) without reasonable excuse, *and* (3) thereby cause prejudice to the prosecution. *U.S. v. D'Argento*, 7 Cir. 1965, 339 F2d 925, 928.

Of course, bail default can incidentally entail disrespect. But here there is only a supposed disrespect, and a total absence of meaningful default.

The effect of the decision below is materially to rewrite the bail agreement, and to introduce a completely irrelevant and subjective standard of proper respect, as a test of its performance.

If the District Court felt its dignity affronted, it had other and more appropriate remedies available. Contempt process against the defendants, and against the lawyer who advised them to appear elsewhere, come immediately and obviously to mind.

But forfeiture of bail is not an appropriate remedy to redress an affront to the District Court. The rights involved are of a totally different genre from the remedy sought to be invoked. With almost equal logic, the District Court might have denied the defendants a jury trial on the same grounds.

And was the District Court truly offended? If so, it masked its resentment well. No such grounds were assigned by the District Court for the imposition of the forefiture. Instead, the District Court stated that the bond was being forfeited because such action was "the only way we can compel attendance." (A. 19) That observation is obviously inappropriate to this case; but it is a vastly different thing from resentment at a supposed affront.

After all, the supposedly contumacious defendants were ultimately permitted to dispose of their cases in Milwaukee, just as they had desired. No suggestion of contempt (or even disapproval)—to the contrary, complete acquiescence in their plan.

And the lawyer on whose advice the defendants did not appear was told by the trial judge that ". . . I do appreciate your careful representation of your clients *as well as your courtesy to the court.*" (A. 26)

Certainly, those are not the actions or statements of a trial judge who feels affronted, or denied proper respect.

B.

The fortuitous nature of the lack of prejudice.

The opinion holds that the absence of prejudice does not "excuse the defendants nor inure to their benefit" because the lack of prejudice was "purely a happenstance."

But the requirement of prejudice as a condition precedent to a bail forfeiture, was not intended to give a defaulting bail principle an opportunity whimsically to mitigate the effect of his default in some mystic manner; nor was it intended to impose upon him some nonsensical affirmative duty of mitigation.

Rather, it is intended to prevent a purely technical forfeiture of bail. It is merely another way of saying that a meaningless breach of the bail contract, not affecting any substantial right of the prosecution, should not be grounds for forfeiture.

For that was the law, before the opinion below was published.

C.

The defendants' awareness of the conflicting trial.

The opinion concedes that if the defendants had appeared on the day in question, their trial could not have proceeded because the District Court was then in the middle of another trial. But that is not an excuse, the opinion holds, because "The record does not show that they were aware thereof."

Of course the record does not show that.

For all practical purposes, there is no record.

The trial court flatly refused to hear anything the surety had to say. The surety tried to present evidence, but the trial court denied permission. (App. 19).

To penalize the surety for deficiencies in a record which it was not permitted to commence to make, much less to complete, is, we suggest, the most fundamental of injustices and denial of all due process.

Certainly, the defendants' lawyer spoke to the prosecutor in advance of the court session (A. 10). Equally surely, any casual inquiry by defendants' Chicago counsel would have disclosed that another trial was in progress. Such inquiries are routine for any lawyer facing a scheduled trial.

It is an obvious injustice to assume that this normal and natural routine was not followed, because of the absence of a record which petitioner was wrongly denied the opportunity to make.

And of course, in this context, as in the case of Point "B" above, the opinion is simply oriented in the wrong direction. Rather than accepting the monolithic proposi-

tion that bail is to be forfeited only where justice can see no other course to follow, the opinion proceeds on the novel premise that forfeitures are to be *vacated* only where no other course is available.

D.

The supposed "inconvenience" to the government.

The opinion holds clearly that a showing of prejudice to the prosecution is unnecessary because of the defendants' supposed disrespect.

But in apparent recognition of previously established law, the opinion holds that there was "inconvenience" to the government, and impliedly equates "inconvenience" with prejudice.

Even if your Honors deem the law properly changed in that respect, it is submitted that there has not been a showing of inconvenience.

The opinion finds inconvenience to have resulted from "the issuance of bench warrants and the enlistment of the aid of the FBI." But that is merely another way of defining a forfeiture: of saying that every actual or supposed bail default involves "inconvenience", so that prejudice (modified to "inconvenience") is necessarily shown every time a bail bond is forfeited.

For there can be no such thing as a declaration of forfeiture of a bail bond, which does not involve both the issuance of a bench warrant and the imposition of a duty on all federal officers to apprehend the defendant if they should see him. That is what a bail forfeiture means, by definition.

The case at bar makes the point with special emphasis.

The bench warrant here was not issued until after the defendants had appeared in open court ahead of time for their trial, and had requested that a bench warrant *not* be issued.

The law up to that time, required that a bench warrant issue on a bond forfeiture, only if it be shown that there has been some prejudice to the government. The opinion below reverses that rule, and holds that the issuance of a bench warrant is in itself prejudice to the government.

If so, it was prejudice self-induced. For the bench warrant was issued while the defendants were present and requesting that it not be issued.

The same is true of the supposed enlistment of the FBI. If one assumes that the FBI automatically looks for all persons whose bail is declared forfeited, then it could be presumed that normal routine was followed in this case. But if that be the presumption, it would follow that prejudice (now revised to mean inconvenience) would necessarily result in every case of declaration of a bond forfeiture, whether justified or unjustified.

And the notion that the FBI had to work on this case, can only be the product of a presumption. There is no record support for the idea. In fact, at the time the bond forfeiture was declared, the prosecutor knew exactly where the defendants were. They were before the United States District Court in Milwaukee, some 90 miles away. The Chicago prosecutor had been in repeated contact with the Milwaukee prosecutor. If it had been desired to apprehend the defendants, nothing could have been simpler.

Certainly, the petitioner had no trouble in finding them. With no serious trouble, the petitioner produced the defendants at the appointed time. If the FBI had any meaningful difficulty in that regard, considering its presumed knowledge of the location of the federal court in Milwaukee, the sophistication of its investigative techniques is called into serious question.

THE BASIC RATIONALE OF THE OPINION

The opinion effectively holds that if the defendants had simply overslept that morning, a totally different problem would be presented. For oversleeping — at least up to now — has not been deemed "a conscious, calculated, deliberate and flagrant . . . affront to (the District Court)".

But the defendants did not oversleep. Instead, knowing that their case could not proceed that day[6] the defendants went to Milwaukee to arrange a plea under Rule 20. This was the "constructive disposition" ultimately approved by the same judge who declared the forfeiture.

They did this with the knowledge of the prosecutor — and the record discloses no objection by him, under circumstances which would cry for a disclosure of such objection if one had been made.

A plea under Rule 20 is simply not a showing of disrespect to the court from which the case is removed. Especially not in this case, where the defendants sought to consolidate cases from three different districts for disposition within the district in which their attorney resided and practiced.

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[6] If for some reason they were unable to learn that from any other source, they would necessarily have learned it when their lawyer called the prosecutor to advise him that the defendants would appear in federal court in Milwaukee. (A. 10).

It is to the prosecutor's credit, that he did not request a bail forfeiture. That was done *sua sponte* by the judge.

But it was done only after the trial judge was advised that one of the defendants had refused to plead guilty in Milwaukee. (A. 10-12). The record fairly shouts that the forfeiture was imposed in retaliation for the refusal by one of the defendants to plead guilty.

Guilty pleas, we suppose, have many advantages — especially where the defendants are in fact guilty.

On the other hand, judicial compulsion of guilty pleas entails many perils. And to employ bail forfeiture as retaliation against a refusal to plead guilty, is utterly destructive of every conceivable constitutional safeguard.

And bail was forfeited here in consequence of a refusal to plead guilty. No reader of this record could come to any other conclusion.

There was no thought of bond forfeiture at the time the defendants did not appear (A. 10). That issue was not raised until much later, when the trial judge was advised that only one of the defendants was willing to plead guilty in Milwaukee, so that he would still have to try the case of the other one (A. 11, 12). The trial judge thereafter refused to vacate the forfeiture because "I am dealing with people who think they are guilty, because that is the only kind of plea that can be accepted under Rule 20" (A. 17).

And that, effectively, is what this case is about: the defendants pled guilty too late.

How much better, if they had simply awakened too late. They would have enjoyed much more favored standing in the eyes of the law; and there would have been no potential precedent whose effect is the destruction of the very keystone of the Bill of Rights.

THE CONFLICT BETWEEN CIRCUITS AND THE NEED FOR CLARIFICATION

Petitioner prosecuted two concurrent appeals to the district court. The first of these was an appeal from the basic judgment. The second, was an appeal from the order denying remission.

The opinion simply disregards the issue of remission. For in the Seventh Circuit the issue of remission is completely discretionary with the trial judge, and is no more reviewable than would be an order granting or denying a continuance. The view of the Seventh Circuit is that even if the action of the trial court is considered on review to have been harsh, it is no more subject to review than is the length of a criminal sentence. *United States* v. *Davis*, 7 Cir. 1953, 202 F.2d 621, 624-625.

On the other hand, in the Fifth Circuit, the ruling on a motion for remission is apparently reviewable in the same manner as any other order. *Dudley* v. *United States*, 5 Cir. 1957, 242 F.2d 656, 659.

And in the Sixth Circuit, the Court of Appeals will apparently make an independent judgment as to the proper amount of remission, even though the lower court has not abused its discretion. *United States* v. *Singleton*, 6 Cir., No. 17038, Memorandum Order entered March 10, 1967 (reprinted as Appendix C for convenience of reference).

Nowhere is the need for uniformity in procedure more necessary, than in respect to bail.

And in few other areas of law is there such substantial variation from circuit to circuit.

THE REFUND OF THE DEFENDANTS' DEPOSIT

When the bail was forfeited, each of the defendants had $2,000 on deposit with the United States District Court in Milwaukee.

Petitioner moved for remission, and further moved that, if the district court believed some forfeiture appropriate, it should be taken from the defendants' cash deposit in Milwaukee, rather than as a penalty against the surety. The issue was squarely presented at all stages below.

That request was ignored in the trial court. Petitioner's motion was denied; defendants were given their money; and the surety was ordered to pay their forfeiture.

The point was renewed on appeal, and was again ignored.

Thus, we are at least spared the establishment of that questionable procedure by stated precedent.

But the lesson is clear. Certainly it is clear, sub silentio, to this petitioner. It is equally clear to the prosecutors.

We hope that your Honors will agree that an issue of real substance cannot be made insubstantial by a failure to entertain it.

Certainly, the petitioner's motion was the only avenue available to it. Moving for remission, it necessarily had not paid the forfeiture. Therefore, it had no standing to proceed directly against the Clerk in Milwaukee.

But the prosecutor, by a simple telephone call or letter showing his claim against that fund, could have blocked its release to the defendants. He flatly refused to do that. The government accordingly refunded to the defendants, money which it thereafter sought to recover from the petitioner as their surety.

The government's actions need have been no different, if its intent had been to avoid disturbing the defendants as a reward for their pleas of guilty, while seeking windfall revenue from the surety. We can make no claim as to what the government had in mind. It never dignified the surety's request by so much as an answer and stated no position whatever. It is, however, quite telling that the defendants' monies were not released to them until April 11, the day after petitioner's motion for remission was denied, although the defendants had commenced service of their sentence two weeks earlier.

We earnestly suggest that the government should not be permitted to refund the cash deposit of the bail principals while seeking to enforce a forfeiture against the bail surety.

CONCLUSION

If the decision below stands undisturbed, neither petitioner nor any other knowledgeable surety can ever again write a bail bond solely because it believes that the applicant is a worthy bail risk.

The true meaning of the decision below, is that commercial bail is too risky to be written for anyone whose private resources will not provide complete indemnity to the surety.

We think it impossible to overstate the importance and the impact of the issues here presented.

We pray that your Honors will deem this cause worthy of review.

Respectfully submitted,

MELVIN B. LEWIS
Attorney for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

March 1, 1968

Before

HON. JOHN S. HASTINGS, *Chief Judge*
HON. LATHAM CASTLE, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. SEAN PATRICK KELLEY and MILDRED NICHOLS, *Defendants,*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
THE SUMMIT FIDELITY & SURETY COMPANY, *Appellee.*	

Nos. 16278 and 16279

ORDER

The Summit Fidelity & Surety Company, appellant herein, prosecutes these consolidated appeals from judgments entered against it on bail bond forfeitures. The appellant was the surety on bail bonds filed on behalf of Sean Patrick Kelley and Mildred Nichols, who were under indictment on charges relating to thefts from federally insured banks,

to secure the appearances of these defendants before the District Court. Similar indictments had been returned against the defendants in federal district courts in Wisconsin and Nevada. The trial date in the District Court was set for 10:00 a.m., November 10, 1966. When the case was called for trial on that date neither the defendants, their counsel, nor the surety, appeared. The condition of the bonds having been broken, the court declared the bonds forfeited, a bench warrant was issued, the trial date reset for November 14, 1966, and the F.B.I. requested to locate the defendants. The court subsequently denied a motion to vacate the forfeitures, entered judgments for the United States, and refused to remit the judgments.

The defendants did appear for trial on November 14, 1966, and after the trial had proceeded for two days the court allowed a mistrial so as to permit the charges to be disposed of before the United States District Court for the Eastern District of Wisconsin pursuant to Rule 20 of the Federal Rules of Criminal Procedure.

This Court having considered the record in these cases transmitted by the district court to this Court as well as the briefs filed by the respective parties herein, and having heard oral arguments in open court by counsel for said parties, and having taken the appeals under advisement for decision, the Court has conferred thereon and is now of the opinion and accordingly holds and adjudges that the judgments from which these appeals were taken are supported by the record herein and the law appertaining thereto.

The record discloses that on November 10, 1966, the defendants and their Wisconsin counsel were in Milwaukee, Wisconsin, making an unscheduled appearance before the

Wisconsin district court to explore the possibility of initiating a Rule 20 proceeding in that court to dispose of all the pending charges in the three jurisdictions.

In *United States* v. *D'Argento*, 7 Cir., 339 F. 2d 925, 928, this Court observed:

"It is clear from the Rule [Rule 46(f)(2) of the Federal Rules of Criminal Procedure] the forfeiture is to be set aside if justice does not require its enforcement."

But here the District Court did not err in concluding that the ends of justice do require enforcement. The defendants' failure to appear was a conscious, calculated, deliberate and flagrant disregard of their obligation to the District Court—an affront to its dignity. The fact that no greater inconvenience resulted from such failure to appear was purely a happenstance — the District Court had not concluded a trial previously commenced. But this fact does not excuse the defendants nor inure to their benefit. The record does not show that they were aware thereof. And, in any event, there was the inconvenience attendant upon the issuance of bench warrants and the enlistment of the aid of the F.B.I. The display of disrespect for the District Court inherent in the cavalier and inexcusable disregard of its setting is enough in the context here involved to require enforcement of the forfeitures in the interest of justice.

Wherefore the judgments from which these appeals were taken are affirmed and the clerk of this Court is directed to enter the judgments of this Court accordingly.